No. 9990

United States Circuit Court of Appeals

For the Ninth Circuit

THE CITY OF FORSYTH, a municipal corporation of the State of Montana, and FAIRBANKS, MORSE & COMPANY, a corporation,

Appellants,

vs.

MOUNTAIN STATES POWER COMPANY, a corporation,

Appellee.

Petition of Appellee for Rehearing

E. G. TOOMEY,
Residence and Postoffice Address:
Helena, Montana.

M. S. GUNN,
CARL RASCH,
MILTON C. GUNN,
Residence and Postoffice Address:
Helena, Montana.
Attorneys for Appellee.

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TO THE HONORABLE THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT:

The appellee, Mountain States Power Company, respectfully petitions the Court for a rehearing in this case upon the ground and for the reason that the reversal should be without prejudice to an application for leave to amend the bill of complaint.

ARGUMENT

In the opinion the Court said:

> "Appellants contend that the matter in controversy is appellee's alleged right to continue in operation free of interference by appellants. Appellee contends that the matter in controversy 'is the value to the appellee of its alleged franchise and the value to the appellants

of the contract for the construction of a municipal plant, at a cost of $169,969.00'. It is unnecessary to decide which of these contentions is correct because *there is no allegation of any kind stating or showing the value of any of such rights.* Therefore jurisdiction does not affirmatively appear within the rule that 'the jurisdiction of a federal court must affirmatively and distinctly appear and cannot be helped by presumptions or by argumentative inferences drawn from the pleadings'. Norton v. Larney, 266 U. S. 511, 515. (Italics ours.)

Other questions presented need not be considered.

The judgment is reversed and the cause is remanded to the court below with directions to dismiss the complaint for want of jurisdiction."

It is apparent that the bill of complaint can be amended by alleging the value of each of the rights referred to and the value of appellees franchise. The District Court, however, is directed to dismiss the complaint and, therefore, could not permit such an amendment.

It appears to be the rule recognized by the Supreme Court of the United States and by the Circuit Courts of Appeals that where there is a dismissal for want of jurisdiction, because of a failure to allege the jurisdictional facts, and it is apparent that the jurisdictional facts could be made to appear by an amendment, the appellate court, instead of directing a dismissal for want of jurisdiction, should make the dismissal conditional upon the failure to amend.

Stuart v. City of Easton, 156 U. S. 46, 39 L. Ed. 341;

Morgan v. Gay, 19 Wallace 81, 22 L. Ed. 100;

Horne v. George H. Hammond Co., 155 U. S. 393, 39 L. Ed. 197;

Menard v. Goggan, 121 U. S. 253, 30 L. Ed. 914;
N. P. Ry. Co. v. Walker, 148 U. S. 391, 37 L. Ed. 494;
Newcomb v. Burbank, 181 Fed. 334;
Tinsley v. Hoot, 53 Fed. 682.

In the case of Thomson v. Gaskill, decided by the Supreme Court of the United States on March 2, 1942, in concluding the opinion, the court said:

> "The record contains no showing of the requisite jurisdictional amount, and the District Court was therefore without jurisdiction. The judgment will be reversed and the cause remanded to the District Court without prejudice to an application for leave to amend the bill of complaint." (Supreme Court Law Ed. Advance Opinions, Vol. 86, No. 9, p. 611).

In the case of McNutt v. General Motors Acceptance Corporation, 298 U. S. 178, 80 L. Ed. 1135, in which it was decided that the record did not show the jurisdictional amount, the Court ordered the dismissal of the complaint without any reservation of the right to amend. The order does not appear to have been questioned. Whether the order was made inadvertently or upon the assumption that the complaint could not be amended so as to show the jurisdictional amount does not appear. In any event, the case of Thomson v. Gaskill, above cited, is the latest case of a reversal because the record failed to show the jurisdictional amount.

It was contended by appellants, as appears from their briefs, that the jurisdictional amount in this case is determined by the loss which appellee would suffer from competition, and that such loss is *damnum absque injuria* for the reason that the appellants' franchise, if it has a franchise, is not exclusive. On the other hand, it is contended by appellee

that, although its franchise is not exclusive, it is entitled to injunctive protection against illegal competition and that the City was without authority to make the contract in question, and, furthermore, that the contract is void for want of mutuality, by reason of which the competition would be illegal. The allegation of the complaint that the appellee has a franchise is denied.

It thus appears that the complaint can be amended to show the jurisdictional amount by alleging the value of the right of the appellee to be free from illegal competition, the value of the right of the City to own and operate an electric plant as contemplated, and the value of appellee's alleged franchise.

Rule 15 of the Rules of Federal Procedure of the District Courts of the United States provides that leave to amend "shall be freely given when justice so requires".

Respectfully submitted,

E. G. TOOMEY,
Residence and Postoffice Address:
Helena, Montana.

M. S. GUNN,
CARL RASCH,
MILTON C. GUNN,
Residence and Postoffice Address:
Helena, Montana.
Attorneys for Appellee.

THIS IS TO CERTIFY that in my judgment the foregoing Petition for Rehearing is well founded and that said petition is not interposed for delay.

M. S. GUNN,
Of Counsel for Appellee.